

Federal Communications Commission

FCC 99-236

Before the  
Federal Communications Commission  
Washington, D.C. 20554

In the Matter of )  
Direct Access to the INTELSAT System )

IB Docket No. 98-192  
File No. 60-SAT-ISP-97

SEP 23 2 07 PM '99  
FEDERAL COMMUNICATIONS COMMISSION

REPORT AND ORDER

Adopted: September 15, 1999

Released: September 16, 1999

By the Commission: Commissioner Furchtgott-Roth issuing a separate statement

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## I. Introduction

1. By this Report and Order, we adopt a policy to allow direct access to the International Telecommunications Satellite Organization ("INTELSAT") from earth stations located within the United States, for the purpose of providing international satellite services. "Direct access" refers to the means by which users of the INTELSAT satellite system may obtain space segment capacity directly from INTELSAT rather than having to go through an INTELSAT Signatory.

2. In our *Notice*, we requested comment on whether Level 3 direct access would result in benefits to carriers, other users, and end users, and whether it would enhance competition.<sup>1</sup> We also

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<sup>1</sup> *In the Matter of Direct Access to the INTELSAT System*, IB Docket No. 98-192, File No. 60-SAT-ISP-97, 13 FCC Rcd 22013, 22035-22042 (1998) ("*Notice*").

tentatively concluded that the Commission has authority under the Communications Satellite Act of 1962, as amended ("Satellite Act"),<sup>2</sup> and the Communications Act of 1934, as amended ("Communications Act"),<sup>3</sup> to permit United States carriers and users contractual, or Level 3 direct access to the INTELSAT system.<sup>4</sup> Level 3 direct access permits a customer to enter into a contractual agreement with INTELSAT for the purpose of ordering, receiving, and paying for INTELSAT space segment capacity at the same rates that INTELSAT charges its Signatories. The *Notice* requested comment on the legal, economic and policy ramifications of permitting U.S. carriers and users direct access to the INTELSAT satellite system, *in lieu* of having to go through Comsat Corporation ("Comsat"), the U.S. Signatory to INTELSAT. We initiated this proceeding as a result of requests in an earlier proceeding by U.S. carriers and other users of INTELSAT that we condition reclassification of Comsat as a non-dominant carrier in its provision of INTELSAT services, on the implementation of direct access in the United States.<sup>5</sup> Although we did not require that direct access be permitted as a condition to granting Comsat non-dominant status, we committed to initiating this proceeding "expeditiously to explore the legal, economic and policy ramifications of [allowing] direct access."<sup>6</sup>

3. In this Report and Order, we affirm our tentative conclusion that the Commission has the authority under both the Satellite Act and the Communications Act to permit Level 3 direct access to INTELSAT from the United States. We also conclude that permitting Level 3 direct access is in the public interest, as it will result in increased competition by enhancing the competitiveness of U.S. telecommunications service providers in the global market. We, therefore, require Comsat, as the United States Signatory to INTELSAT, to inform INTELSAT, pursuant to established INTELSAT procedures, that Level 3 direct access to INTELSAT is available in the United States to U.S. carriers and users, consistent with the terms of this Report and Order. We will permit Comsat to file a tariff with the Commission that will require Level 3 direct access customers in the United States to reimburse Comsat for certain costs it must incur in its unique role as U.S. Signatory to INTELSAT that are not recoverable by Comsat under an INTELSAT Level 3 direct access regime. We also require that under certain limited circumstances, INTELSAT waive its immunities to provide Level 3 access in the United States. We deny the requests made by carriers in this proceeding for "fresh look" of their long-term contracts with Comsat for INTELSAT space segment. We also find that the record does not support at this time requests by carriers advocating "portability" of INTELSAT space

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<sup>2</sup> Communications Satellite Act of 1962, as amended, 47 U.S.C. § 701 *et seq.* (1962).

<sup>3</sup> Communications Act of 1934, as amended, 47 U.S.C. § 151 *et seq.*

<sup>4</sup> *Notice*, 13 FCC Rcd at 22014 and 22022-22029.

<sup>5</sup> *Comsat Corporation Petition Pursuant to Section 10(c) of the Communications Act of 1934, as amended, for Forbearance from Dominant Carrier Regulation and for Reclassification as a Non-Dominant Carrier*, Order and Notice of Proposed Rulemaking, 13 FCC Rcd 14083 (1998) ("*Comsat Non-Dominant Order*"). See also *Notice*, 13 FCC Rcd at 22014.

<sup>6</sup> *Comsat Non-Dominant Order*, 13 FCC Rcd at 14087-14088 & 14160. See *Notice*, 13 FCC Rcd at 22014.

segment capacity that is held by Comsat.<sup>7</sup> If necessary, we would, however, consider such relief at a later date to assure the benefits of direct access, if supported with sufficient evidence and commercial solutions appear unavailable.<sup>8</sup> Finally, in order to eliminate an incentive of Signatories to reduce prices for direct access to uneconomic levels, we will not authorize any Signatory, other than Comsat, to purchase direct access in the United States for service to or from any specific foreign country in which the Signatory in question controls 50 percent or more of all INTELSAT capacity consumed in that respective country.<sup>9</sup>

4. We recognize that Congress may consider legislation on the issue of direct access to INTELSAT. Comprehensive bills were passed in 1998 by the House<sup>10</sup> and by the Senate this year,<sup>11</sup> that would rewrite the Satellite Act. While our decision in this proceeding is based on current law, Congress retains the prerogative to legislate in this area. Congressional action clearly would supersede any inconsistent interim action taken in this proceeding.

## II. Background

5. INTELSAT is a 143-member cooperative that owns and operates a global satellite system over which, since 1964, much of the world's international telephone, video, data and other communications have been and continue to be transmitted. It operates 19 satellites, serving over 99 percent of the globe and accessed by over one thousand earth stations.<sup>12</sup> INTELSAT had nearly \$1 billion in revenues in 1998.<sup>13</sup> INTELSAT is an intergovernmental organization in which an Assembly of Parties, comprised of government representatives, determines overall policy, and a Board of Governors, comprised of Signatories who are the investors in the system, make commercial decisions. Comsat is the U.S. Signatory to INTELSAT. It was created pursuant to the Satellite Act, which made

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<sup>7</sup> "Portability" refers to the right of a current customer of Comsat to obtain the transponder capacity it currently receives through Comsat and use it under a direct access to INTELSAT regime.

<sup>8</sup> Unless stated otherwise, all references herein to "direct access" refer to "Level 3 direct access." See *infra* at ¶ 8 for a description of the four types of direct access to INTELSAT.

<sup>9</sup> See *infra* ¶¶ 95-100 (discussion of direct access by dominant INTELSAT Signatories).

<sup>10</sup> H.R. 1872, "Communications Satellite and Privatization Act of 1998," was passed by the House on March 13, 1998.

<sup>11</sup> S. 376, "Open-market Reorganization for the Betterment of International Telecommunications Act," was passed by the Senate on July 1, 1999.

<sup>12</sup> Prior to November 1998, when it transferred five operating satellites to its spin-off, New Skies Satellites, N.V., INTELSAT was perennially the largest satellite capacity provider in the world.

<sup>13</sup> See INTELSAT Web Page: <http://www.INTELSAT.com/about/INTELSAT.htm>.

it U.S. policy to create the global satellite system that became INTELSAT.<sup>14</sup> Currently, access to INTELSAT satellites from the United States requires carriers and other users to go through Comsat.

6. INTELSAT operates as a cost sharing cooperative on a commercial basis with the long term objective of providing services at prices which meet its revenue requirements. Each Signatory investor contributes capital to INTELSAT and receives capital repayments and compensation for the use of capital in proportion to its investment share.<sup>15</sup> Capital repayments are calculated so as to return all surplus cash to investors. Compensation for the use of capital is calculated based on a target rate or range of return, which is established by the INTELSAT Board of Governors (that includes Comsat).<sup>16</sup> All investors are entitled to the target rate of return. In 1997, the INTELSAT Board of Governors decided to establish a range of 14-18 percent as the target rate of return and to review the range annually. During 1997, the actual return on shareholders' invested capital was approximately 18 percent.<sup>17</sup>

7. INTELSAT provides space segment capacity to users of its global satellite system. These users then provide telecommunications services to the public. The users include Signatories, Duly Authorized Telecommunication Entities ("DATES"),<sup>18</sup> and direct access users. INTELSAT charges for use of space segment capacity are determined by the INTELSAT Board of Governors and are termed "INTELSAT utilization charges" ("IUCs"). IUCs are based on several factors, including beam coverage, spectrum capacity or data rates, and lease periods. They are listed in the INTELSAT Tariff Manual.<sup>19</sup> Comsat's charges to users include the IUC component, plus an additional mark-up.

8. In 1992, INTELSAT introduced new procedures for gaining direct access to INTELSAT satellites by non-Signatory carriers and users. INTELSAT offers four types or "levels" of direct access

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<sup>14</sup> 47 U.S.C. § 701(a)-(c).

<sup>15</sup> See Agreement Relating to the International Telecommunications Satellite Organization, "INTELSAT", 23 U.S.T. 3813; TIAS No. 7532, (February 12, 1973). See also Operating Agreement Relating to the International Telecommunications Satellite Organization, "INTELSAT", 23 U.S.T. 4091, (August 20, 1971). The investment share required by a Signatory is equal to its usage. A Signatory also may make additional investments above this required level, as Comsat has historically done.

<sup>16</sup> *Id.*

<sup>17</sup> INTELSAT 1997 Annual Report at 30 and 37.

<sup>18</sup> DATES are entities from non-member INTELSAT countries authorized by INTELSAT to use the INTELSAT satellite system.

<sup>19</sup> See Notice, 13 FCC Rcd at Appendix B.

by non-Signatories.<sup>20</sup> The first two levels involve access to information while the third and fourth levels involve access to communications services. Level 1 direct access permits customers to receive operational and technical information and attend global traffic meetings as an operation representative. Level 2 direct access permits customers to meet with INTELSAT management and staff regarding capacity availability, commercial and INTELSAT tariff matters. Level 3 direct access permits customers to enter into a contractual agreement with INTELSAT for ordering, receiving, and paying for INTELSAT space segment capacity at the same rates that INTELSAT charges its Signatories. Level 4 direct access permits customers, in INTELSAT member countries only, to make a capital investment in INTELSAT in proportion to its utilization of the INTELSAT system, as well as obtain INTELSAT space segment capacity at INTELSAT tariff rates. A Level 4 customer is not accorded rights to participate in the INTELSAT governance process unless special arrangements are made by the Party and the official Signatory representing its country.

9. INTELSAT permits direct access only in countries where it is authorized by the Signatory representative. Signatory authorization may be on an individual customer basis or by "blanket authorization," whereby entities within the stated jurisdiction are authorized to directly access INTELSAT without first having to obtain specific approval from the Signatory. For both Level 3 and Level 4 direct access, a customer is required to enter into a service agreement with INTELSAT that sets forth the general terms and conditions by which INTELSAT will supply space segment capacity.<sup>21</sup> So long as the service agreement remains in effect, a customer is able to access INTELSAT space segment directly. Level 3 customers have no investment obligations or rights to participate in the operation of the INTELSAT system. Furthermore, a Signatory permitting Level 3 direct access will earn a return on its investment in space segment capacity used by the Level 3 customer (currently between 14 and 18 percent).<sup>22</sup>

10. Level 3 direct access is now available in 65 countries and Level 4 direct access is available in 29 countries -- for a total of 94 countries that allow direct access. Neither Level 3 nor Level 4 direct access is available in the United States. INTELSAT satellite service is only available to U.S. customers through Comsat. Comsat provides INTELSAT services to U.S. customers on a common carrier basis through tariffs and long-term contracts filed with the Commission.

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<sup>20</sup> Notice, 13 FCC Rcd at 22016, n.21, citing *Accessing INTELSAT . . . Directly*, reprinted in Record of Hearing Before the Subcommittee on Telecommunications, Trade, and Consumer Protection on H.R. 1872 at 135-141, "<http://www.intelsat.com/cmc/connect/access.htm>"; See also INTELSAT AP-21-E Report by the Board of Governors on *INTELSAT Access Arrangements*, March 18, 1997.

<sup>21</sup> Copies of the service agreements are available on INTELSAT's world-wide-web page: <http://www.intelsat.com/cmc/connect/servform.htm>.

<sup>22</sup> Comsat, therefore, would earn an investment return on any Level 3 direct access to INTELSAT from the United States in proportion to the use of space segment capacity.

11. In 1984, the Commission concluded a separate proceeding on direct access to the INTELSAT system, prior to INTELSAT developing any procedures for direct access.<sup>23</sup> In that proceeding the Commission considered whether United States carriers should be permitted direct access to INTELSAT space segment capacity through two alternative forms: (1) capital leases; and (2) an indefeasible right of use ("IRU").<sup>24</sup> In terminating the proceeding, the Commission concluded that neither alternative would provide substantial benefits. The Commission indicated, however, that it would be amenable to reconsidering the issue of direct access at a future date.<sup>25</sup>

12. In 1998, we reclassified Comsat as a non-dominant carrier in the provision of INTELSAT switched-voice, private line, and occasional-use video services to markets deemed "competitive."<sup>26</sup> We also declared Comsat non-dominant in the provision of INTELSAT full-time video and earth station services in all markets. As a result of this finding, rate of return regulation was eliminated in those markets. In that same decision we denied Comsat's request for reclassification as a non-dominant carrier in other INTELSAT services markets that were deemed "non-competitive." A number of parties in the *Comsat Non-Dominant* proceeding asked that direct access to INTELSAT be made a condition to granting the regulatory relief that Comsat was then seeking.

13. In initiating the instant proceeding, we incorporated by reference the relevant portions of the record from the *Comsat Non-Dominant* proceeding into this proceeding.<sup>27</sup> We identified legal, economic, and policy issues for comment by interested parties. We tentatively concluded that the Satellite Act and Communications Act afforded the Commission discretion to permit direct access in the United States and that exercise of this discretion would not violate the Fifth Amendment.<sup>28</sup> We

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<sup>23</sup> See *Regulatory Policies Concerning Direct Access to INTELSAT Space Segment for U.S. International Service Carriers*, Notice of Inquiry, 90 FCC 2d 1446 (1982) ("1982 Direct Access Inquiry"); *Regulatory Policies Concerning Direct Access to INTELSAT Space Segment for the U.S. International Service Carriers*, Report and Order, 97 FCC 2d 296 (1984) ("1984 Direct Access Order"), *aff'd* *Western Union Int'l, Inc. v FCC*, 804 F.2d 1280 (D.C. Cir. 1986).

<sup>24</sup> 1982 Direct Access Inquiry, 90 FCC 2d at 1452-1454. See also Notice, 13 FCC Rcd at 22015. Under a capital lease, Comsat would have leased space segment facilities to the carriers on a "cost-pass-through" basis, plus a "ministerial fee" to cover administrative and maintenance costs incurred by Comsat in connection with the provision of the particular facilities leased to them. Under an IRU, the end-to-end carriers would have purchased investment interests in a specific number of circuits in the INTELSAT system through Comsat. Under this approach, the carriers, in addition to their investments, would have paid Comsat a fee to cover its costs of providing satellite service and carrying out its functions as U.S. Signatory.

<sup>25</sup> 1984 Direct Access Order, 97 FCC 2d at 298 and 326.

<sup>26</sup> *Comsat Non-Dominant Order*, 13 FCC Rcd at 22013.

<sup>27</sup> Notice, 13 FCC Rcd at 22014.

<sup>28</sup> *Id.* at 22020-22035.

further asked for comment on issues related to (1) the potential benefits of direct access;<sup>29</sup> (2) competitive concerns raised by direct access;<sup>30</sup> and (3) the effect of direct access on United States efforts to privatize INTELSAT.<sup>31</sup> As to the question of potential benefits, we requested comment on several issues, including: (1) whether Comsat should be entitled to recover costs that would not be covered by INTELSAT IUC rates and return on investment under Level 3 direct access;<sup>32</sup> (2) what effect permitting Comsat such cost recovery would have on potential savings to U.S. carriers and users from Level 3 direct access;<sup>33</sup> (3) whether the availability of Level 3 direct access from INTELSAT might lead us to different conclusions than the Commission made in its *1984 Direct Access Order*;<sup>34</sup> (4) whether permitting Level 3 direct access for services to non-competitive markets would result in consumer alternatives and benefits that do not exist now;<sup>35</sup> and (5) whether it would be desirable to permit Level 3 direct access to competitive markets where Comsat is found to be non-dominant.<sup>36</sup>

### III. Pleadings

14. a. Eighteen parties filed initial comments in response to our *Notice* in this proceeding.<sup>37</sup> Twelve parties filed reply comments.<sup>38</sup> Fourteen parties fully support permitting Level 3 direct access

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<sup>29</sup> *Id.* at 22035-22040.

<sup>30</sup> *Id.* at 22040-22041.

<sup>31</sup> *Id.* at 22041-22042.

<sup>32</sup> *Id.* at 22037.

<sup>33</sup> *Id.* at 22038.

<sup>34</sup> *Id.* at 22037-22038.

<sup>35</sup> *Id.* at 22039.

<sup>36</sup> *Id.* at 22039-22040.

<sup>37</sup> The parties filing comments are: Americatel, AT&T Corp., ("AT&T"), BT North America ("BTNA"), Cable & Wireless (includes Cable & Wireless plc and Cable & Wireless USA) ("C&W"), Comsat Corporation ("Comsat"), Columbia Communications Corp., ("Columbia"), Ellipso, Inc. ("Ellipso"), GE American Communications ("GE Americom"), GlobeCast North America Inc., ("GlobeCast"), ICG Satellite Services ("ICG"), IT&E Overseas ("IT&E"), Lockheed Martin ("Lockheed"), Loral Space & Communications ("Loral"), MCI WorldCom, Inc., ("MCI WorldCom"), Networks (ABC, CBS, NBC and Turner) ("Network"), PanAmSat Corporation ("PanAmSat"), Sprint Communications Company ("Sprint"), Three Angels Broadcasting Network ("Three Angels").

<sup>38</sup> Reply comments were filed by: AT&T, BT North America, C&W, Comsat, GE Americom, GlobeCast, ICG, INTELSAT, Lockheed Martin, MCI WorldCom, Networks, and PanAmSat.



in the United States.<sup>39</sup> Among others, these supporters include the Networks (ABC, CBS, NBC, and Turner); U.S. long distance carriers AT&T, MCI WorldCom, and Sprint; satellite service providers GE Americom, Loral, and Ellipso; and U.S. affiliates of United Kingdom service providers, BT North America and Cable & Wireless U.S.A. PanAmSat supports Level 3 direct access under certain conditions.<sup>40</sup> Columbia expresses strong reservations about direct access and requests that we consider the impact on competition and the imposition of conditions to prevent harm to competition in the U.S. market.<sup>41</sup> Comsat and Lockheed Martin oppose permitting Level 3 direct access.<sup>42</sup> INTELSAT does not take an official position on direct access in this proceeding but submits reply comments in response to certain matters raised in the initial comments.<sup>43</sup>

15. Comsat and Lockheed Martin oppose allowing direct access to INTELSAT by other users within the United States. Comsat also contends that there is no economic and policy basis for Level 3 direct access. It asserts that: (1) the findings in the Commission's 1984 decision still apply;<sup>44</sup> (2) growth in competition and recent Commission findings about the current market place show no need for direct access in the United States;<sup>45</sup> (3) competitive harm in the United States market would result from allowing INTELSAT to directly enter this market;<sup>46</sup> and (4) any benefits from direct access would be *de minimis* and short lived.<sup>47</sup> Comsat also contends that implementation of Level 3 direct access would require a substantial surcharge to fairly compensate Comsat for Signatory costs not covered by INTELSAT IUC rates. Lockheed Martin asserts that any benefits from direct access would be short lived and that there is no evidence that it would promote competition.<sup>48</sup> Instead, it emphasizes the need for the Commission to focus on privatization of INTELSAT.<sup>49</sup> Both Comsat and Lockheed Martin contend that United States policy goals in privatizing INTELSAT would be put in

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<sup>39</sup> Comments of Americatel, AT&T, BT North America, C&W, Ellipso, GE Americom, GlobeCast, ICG, IT&E, Loral, MCI WorldCom, Network, Sprint, and Three Angels.

<sup>40</sup> PanAmSat comments at 1-2.

<sup>41</sup> Columbia comments at 4-8.

<sup>42</sup> Comsat comments at 1-3 and Lockheed Martin comments at 2-4.

<sup>43</sup> INTELSAT reply. INTELSAT did not submit initial comments.

<sup>44</sup> Comsat comments at 44-61.

<sup>45</sup> *Id.* at 50-60.

<sup>46</sup> *Id.* at 62-68.

<sup>47</sup> *Id.* at 73-76.

<sup>48</sup> Lockheed Martin comments at 5-13.

<sup>49</sup> *Id.* at 4.

jeopardy if the Commission adopts Level 3 direct access in the United States.<sup>50</sup> Comsat also opposes direct access as (1) a violation of the 1962 Satellite Act;<sup>51</sup> and (2) an "unconstitutional taking" of property requiring compensation by the United States Government.<sup>52</sup>

16. Parties advocating implementing Level 3 direct access support the tentative conclusions reached in the *Notice*. Several parties maintain that permitting direct access will promote competition and result in: (1) greater customer choice due to the availability of competitive alternatives for accessing INTELSAT (where INTELSAT is their system of choice);<sup>53</sup> (2) opportunity for substantial cost savings as a result of competition for accessing INTELSAT, resulting in reduced end user prices;<sup>54</sup> (3) greater customer control over service provision (involving service quality, performance costs, connectivity and redundancy);<sup>55</sup> and (4) efficiencies in system planning and set up of circuits.<sup>56</sup> Several parties assert that these commercial benefits will make United States carriers more competitive in global telecommunications markets where use of INTELSAT circuits is part of their commercial strategy.<sup>57</sup> Three parties also argue that the availability of Level 3 direct access would eliminate an

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<sup>50</sup> Comsat comments at 69-72; Lockheed comments at 13-15.

<sup>51</sup> Comsat comments at 4-32.

<sup>52</sup> *Id.* at 34-41.

<sup>53</sup> See Americatel comments at 1; AT&T comments at ii and 11-12 and reply at iii and 1; BT North America reply at 4 and 22-23; C&W comments at 2; Ellipso comments at 7 and 9; GE Americom comments at 7 and reply at 5-6 and 8; ICG comments at 3 and reply at 6 and 8-9; IT&E comments at 2; Loral comments at 4-6; MCI WorldCom comments at 14; Network comments at 7; PanAmSat reply at 5; Sprint comments at 7; and Three Angels comments at 2-3.

<sup>54</sup> See Americatel comments at 1; AT&T comments at ii and 11-12 and reply at i, iii, and 13-14; BT North America comments at 5-6 and reply at 4 and 22-23; C&W comments at 2 and at 3-4; Ellipso comments at 3 and 6; GE Americom comments at 7-10 and reply at 8; GlobeCast comments at 3; ICG comments at 3 and reply at 6; Loral Orion comments at 5; MCI WorldCom comments at ii-iii, 14, and 18 and reply at 12 and 16-17; Network comments at 7; PanAmSat reply at 5 and 13; Sprint comments at 7; and Three Angels comments at 2-3.

<sup>55</sup> See Americatel comments at 1; AT&T at ii and 11-12 and reply at iii and 1; C&W comments at 2 and reply at 4; Ellipso comments at 6-7 and 9; GE Americom comments at 7 and 9; Loral Orion comments at 5; MCI WorldCom comments at 14; Network comments at 7-8; and Three Angels comments at 2-3.

<sup>56</sup> See AT&T comments at ii and 11-12; C&W comments at 2; Ellipso comments at 3, 6, and 16; GE Americom comments at 9 and 11; ICG comments at 3; Loral Orion comments at 5; and MCI WorldCom comments at 20.

<sup>57</sup> See Americatel comments at 1; AT&T comments at 12-13; BT North America reply at 4 and 25-26; C&W comments at 3 and reply at 4-5; Ellipso comments at 2, 8, and 15-19; GE Americom comments at 8 and reply at 11; Globecast comments at 3-4 and reply at 4; ICG comments at 3 and reply at 6-7; IT&E comments at 2-3; Loral Orion comments at 4 and 6; and MCI WorldCom

unnecessary and artificial incentive to send traffic over fiber to foreign earth stations to obtain lower cost INTELSAT access from locations outside the United States.<sup>58</sup> Several contend that the benefits just described are available in many countries to INTELSAT users and should also be made available to United States users of the INTELSAT system.<sup>59</sup> They urge the Commission to make direct access available on all routes.<sup>60</sup> Furthermore, several parties challenge Comsat's contention that direct access will result in competitive harm in the United States market.<sup>61</sup> They emphasize their support of privatization of INTELSAT and disagree that direct access will adversely affect United States efforts to achieve this goal.<sup>62</sup> Some parties also disagree with Comsat that a surcharge must be imposed to allow Comsat to recover costs not recoverable under Level 3 direct access.<sup>63</sup> The carriers request, that in its implementation of Level 3 direct access in the United States, the Commission permit a "fresh look"<sup>64</sup> of existing long-term contracts with Comsat and "portability"<sup>65</sup> of the INTELSAT capacity now being accessed through Comsat. Finally, most parties assert that we have authority under the Satellite

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comments at iii, 16, and 18 and reply at 17; and PanAmSat reply at 5.

<sup>58</sup> See Loral Orion comments at 6-7; MCI WorldCom comments at 16-17; and Sprint comments at 8.

<sup>59</sup> See AT&T comments at 13; BT North America comments at 1, 3-4, and 7-8 and reply at 22; C&W comments at 2; GE Americom comments at 2 and reply at 7-9; ICG reply at 5; INTELSAT reply at 2; MCI WorldCom comments at 16 and reply at iii and 20-21; and Network reply at 9 and 12-13.

<sup>60</sup> See Loral Orion comments at 4; MCI WorldCom comments at iii and 17-21; Network comments at iii, 6, and 13-14; PanAmSat comments at 1, 5, and 10; and Sprint comments at 7-9.

<sup>61</sup> See BT North America reply at 23-25; C&W comments at 8; Ellipso comments at 10-12; MCI comments at iii and 21-23 and reply at 25-26; and Network comments at 14.

<sup>62</sup> See C&W reply at 3; Ellipso comments at 12-13; GE Americom comments at 12-14 and reply at 2, 5, and 9-11; Globecast reply at 4; ICG comments at 8; INTELSAT reply at 7-8; MCI WorldCom comments at iv and 23-24 and reply at 26-27; and Network reply at iii and 11-12.

<sup>63</sup> See AT&T reply at ii, 1, and 14-15; BT North America reply at 27-30; C&W comments at 3-6 and reply at 2 and 5; GE Americom comments at 10-12 and reply 2 and 6-9; Globecast reply at 4; MCI WorldCom reply at iii-iv, 15-16, 18, and 21-25; Network reply at iv and 15-19; and PanAmSat comments at 6-7 and reply at 6-7.

<sup>64</sup> See AT&T comments at 13-15; Globecast reply at 5-6; ICG comments at 5-6; IT&E reply at 1-3; Loral Orion comments at 8-9; MCI WorldCom comments at iv and 24-28 and reply at i and 13-14; Network reply at iv and 19-20; PanAmSat comments at 7-10 and reply at 7; and Sprint comments at 10-13.

<sup>65</sup> See MCI WorldCom comments at 24-30 and reply at i, and 13-14; Sprint comments at 10 and 13-14.

Act to permit direct access to INTELSAT satellites in the United States,<sup>66</sup> and that such action would not violate the Fifth Amendment as an uncompensated taking.<sup>67</sup>

17. PanAmSat supports ending Comsat's monopoly over the provision of INTELSAT services in the United States, but believes that the issue should be resolved by Congress.<sup>68</sup> Nevertheless, PanAmSat contends that if we were to implement Level 3 direct access we should permit direct access in all markets and all routes and regulate INTELSAT as a regular commercial satellite operator.<sup>69</sup> PanAmSat also believes that the Commission should apply "fresh look" with respect to Comsat's long-term contracts with U.S. carriers.<sup>70</sup> PanAmSat opposes any Comsat surcharge (over IUC rates) on Level 3 direct access users.<sup>71</sup> Finally, PanAmSat maintains that the Commission has the legal authority to permit Level 3 direct access in the United States and that such action would not constitute an uncompensated taking in violation of the Fifth Amendment.<sup>72</sup>

18. Columbia is concerned about the competitive concerns raised by direct access. It maintains that, at a minimum, INTELSAT should be required to waive its immunity from lawsuit and exemption from taxation as a condition of imposing any type of direct access.<sup>73</sup> Columbia also asserts that we should grant direct access to INTELSAT in the United States only in the context of a pro-competitive privatization that subjects a privatized INTELSAT to U.S. competition laws and promotes open markets, consistent with the World Trade Organization Agreement on Basic Telecommunications

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<sup>66</sup> See AT&T comments at i and 1-3 and reply at i and 2-7; BT North America comments at 3 and 9-11 and reply at 1-3, 5, and 11; C&W comments at 6-8 and reply at 1; Ellipso comments at ii and 5-6; GE Americom comments at i and 2-7 and reply at 3-6; GlobeCast comments at 2 and reply at 2-3; ICG reply at 2-6; IT&E comments at 1 and 3-4; Loral Orion comments at 1-2; MCI WorldCom comments at i-ii and 3-7 and reply at i-ii and 2-8; Network comments at iv, 6, and 14-18 and reply at iii and 3-9; PanAmSat comments at 2-4 and reply at 3-9; and Sprint comments at 3-5.

<sup>67</sup> See AT&T comments at i and 5-11 and reply at ii-iii and 11-12; C&W comments at 9-10 and reply at 1; GE Americom at 7 and reply at 4-5; GlobeCast reply at 3-4; IT&E comments at 3-4; Loral Orion comments at 2; MCI WorldCom comments at i-ii and 7-9 and reply at ii and 9-11; Network comments at iv, 6, and 14-16; PanAmSat comments at 2 and 4-5 and reply at 1 and 3-5; and Sprint comments at 6.

<sup>68</sup> PanAmSat comments at 1-3.

<sup>69</sup> *Id.* at 7-8.

<sup>70</sup> *Id.* at 9-10.

<sup>71</sup> *Id.* at 6.

<sup>72</sup> *Id.* at 3-5.

<sup>73</sup> Columbia comments at 3-5.

Services ("WTO Agreement").<sup>74</sup> Columbia suggests that we analyze INTELSAT's entry into the U.S. market based on our "DISCO II" standards.<sup>75</sup>

19. Finally, INTELSAT responds to certain comments of PanAmSat. It states that the Commission lacks authority to regulate INTELSAT as it would any other carrier and that its immunities remain intact, notwithstanding provisions in the recently passed International Anti-Bribery and Fair Competition Act of 1998 (the Anti-Bribery Act).<sup>76</sup> It also states that Commission action on direct access will not affect progress on INTELSAT privatization efforts.<sup>77</sup>

#### IV. Discussion

##### A. Economic, Competition, and Policy Issues

20. The issue posed in this proceeding is whether U.S. carriers and users of international telecommunications transmission facilities should be permitted the choice of obtaining satellite services directly from INTELSAT or continue to require that access in the United States occur only through Comsat, the U.S. Signatory to INTELSAT. The record demonstrates that foreign carriers and other users of INTELSAT in countries that permit direct access have realized greater cost savings, efficiencies, and service benefits by directly accessing INTELSAT rather than going solely through a Signatory. The availability of additional choices are increasingly important to U.S. carriers and users because they must compete on a global basis with their foreign counterparts who presently can obtain direct access, a choice available in 94 countries. In addition, we believe direct access will promote further competition in the international telecommunications market. The competitive nature of the global telecommunications market requires that we assure U.S. carriers and service providers the availability of choices that their foreign competitors now enjoy.

21. The Commission did not implement a direct access policy in 1984 because it determined that the options it was then considering would not result in significant cost savings or other benefits.<sup>78</sup>

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<sup>74</sup> *Id.* at 9. The commitments undertaken as a result of the WTO basic telecommunications services negotiations ending in 1997 are incorporated into the General Agreement on Trade in Services ("GATS") by the Fourth Protocol to the GATS. FOURTH PROTOCOL OF THE GENERAL AGREEMENT ON TRADE IN SERVICES (WTO 1997), 36 I.L.M. 354, 366 (1997). These commitments are referred to as the WTO Basic Telecom Agreement, although they are not technically contained in a stand-alone agreement.

<sup>75</sup> *Id.* at 5-7, citing *Amendment of the Commission's Regulatory policies to Allow Non-U.S. Licensed Space Stations to Provide Domestic and International Satellite Service in the United States*, 12 FCC Rcd 24094, 24141-50 (1997) ("DISCO II Order").

<sup>76</sup> INTELSAT reply at 3-7.

<sup>77</sup> *Id.* at 7-8 (referencing the International Anti-Bribery and Fair Competition Act of 1998, Pub. L. No. 105-366 (1998)).

<sup>78</sup> 1984 *Direct Access Order*, 99 FCC 2d at 313-319.

Instead, the Commission pursued a facilities-based competition policy between and among fiber optic cable and satellite providers. The INTELSAT system continues, however, to be a key source of international satellite transmission capacity for U.S. carriers or users which find it either commercially necessary or desirable to use INTELSAT. The record demonstrates that the direct access program formally created by INTELSAT in 1992, and available today, along with the greater sophistication of INTELSAT, U.S. carriers, and other users of INTELSAT, has eliminated many of the concerns that gave rise to the conclusion in 1984 that direct access would not yield significant cost savings and efficiencies. Therefore, as discussed below, we find that direct access in the United States will result in a variety of significant benefits (including cost savings for consumers, as well as contribute to a more competitive satellite service market in the United States) and authorize its implementation.

**(1) Benefits of Direct Access**

22. In the *Notice* we identified several user benefits generated by direct access (as described by INTELSAT): (1) improved responsiveness to customer inquiries on service implementation; (2) avoidance of mark-up costs charged to third parties; (3) greater control over service quality, performance costs, connectivity, redundancy, and earth station capabilities; and (4) more flexibility (than through third parties) in tailoring services in terms of bandwidth, time duration, performance standard, redundancy, and service applications.<sup>79</sup> The parties supporting direct access maintain that these benefits are substantial and desirable. Comsat and Lockheed Martin contend that any benefits would be insubstantial. The record in this proceeding demonstrates that Level 3 direct access will afford opportunities for U.S. customers who utilize the INTELSAT system to realize greater efficiency, flexibility, control, and cost savings. Affording customers the opportunity to enjoy these benefits will promote competition and thus strengthen U.S. competitiveness in global telecommunications markets.

**(a) Operational Benefits**

23. *Greater Efficiency.* The prior 1984 *Direct Access Order* proceeding, found that adopting the direct access options then under consideration would not yield significant benefits in terms of increased efficiency.<sup>80</sup> We were concerned, at that time, that many functions Comsat then provided to U.S. carriers would have to be undertaken by the carriers. For example, in 1984, Comsat (rather than INTELSAT) provided most of the functions necessary to access INTELSAT, including coordination for special services, detailed billing, earth station certification and access arrangements, market research, customer surveys, and pricing analysis. Therefore, at that time, we were uncertain how U.S. carriers would achieve significant efficiencies if they had to duplicate these functions.

24. The advent of INTELSAT's formal direct access program, as well as the time that has passed since our consideration of direct access in 1984, justifies a revisiting of the 1984 conclusion. Direct access customers are now able to work exclusively with INTELSAT on all service needs -- from the initial planning stages through to the final end-to-end testing and implementation of service, without

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<sup>79</sup> See *Notice*, 13 FCC Rcd at 22035.

<sup>80</sup> 1984 *Direct Access Order*, 99 FCC 2d at 318.

the need for any Signatory involvement. Since introducing direct access in 1992, INTELSAT has established Regional Service Centers that provide administrative, market, and technical support to direct access customers. INTELSAT now has Regional Directors and Customer Support teams that offer end-to-end billing services, consultation with customers to help them better understand the unique needs of their markets, and technical expertise, at any time, at no additional charge to IUC rates.

25. INTELSAT also now performs the administrative and technical functions to assure operational capability of earth stations with its satellites. The cost of these functions are included in the IUC rates. The technical functions include "link budget" analysis to verify the bandwidth to be used, the size of the earth station, and verification that earth station performance specifications meet INTELSAT standards. Following technical analysis, INTELSAT performs transmission or "carrier" line-up tests with the earth station to verify that the transmission performance meets the technical specifications, consistent with INTELSAT standards. The INTELSAT Operating Center monitors customer use of the satellites on a 24-hour-a-day basis to insure that satellite transmissions operate properly. If there are problems, INTELSAT will attempt to identify them, including the source, and contact all customers that might be affected.

26. Currently, Comsat technical assistance for accessing INTELSAT from the United States is minimal in most cases. U.S. carriers and other INTELSAT users own and operate the earth stations that communicate with INTELSAT satellites, or use the earth station facilities of operators that work directly, and essentially, exclusively with INTELSAT. MCI WorldCom states that although Comsat is not involved in arranging communication services in connection with MCI WorldCom's owned-and-operated earth stations, it must nonetheless pay Comsat's mark-up over IUC rates.<sup>81</sup> Similarly, the Networks note that they almost always access INTELSAT directly from their own earth stations and that Comsat provides no transmission facilities of its own, but merely acts as an unnecessary intermediary between INTELSAT and the customer.<sup>82</sup>

27. Unlike 1984, INTELSAT now offers three different on-line services for INTELSAT's direct access customers in order to allow it to respond quickly to their business needs: (1) The INTELSAT Business Network; (2) TVMax for on-line ordering; and (3) the Digital ESC for direct communication. The Business Network provides direct access customers 24-hour, seven-days-a-week access to INTELSAT service information regarding INTELSAT coverage and capacity, ordering and confirmation capabilities, cybercast training and INTELSAT launch videos, forums and discussion groups, and a wide range of technical information.<sup>83</sup> TVMax is a web-based booking and scheduling system which gives customers real-time access to INTELSAT's occasional-use video reservation system. The Digital ESC allows customers to use their web-browser to search and view on-line documents and databases from their desktop computer, and provides a gateway to a variety of on-line

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<sup>81</sup> See MCI WorldCom comments at 13.

<sup>82</sup> Network comments at 7-8.

<sup>83</sup> See <http://www.INTELSAT.Int/csc/online.htm>.

operational, technical and financial services.<sup>84</sup> In addition, a direct access customer can easily obtain all the information needed in order to place an INTELSAT capacity order by accessing INTELSAT's web page under the title "Become a Customer."<sup>85</sup> These on-line services allow INTELSAT to respond rapidly to customer inquiries on service implementation, while allowing INTELSAT users the ability to be more efficient in their planning and use of the INTELSAT system.

28. INTELSAT also has recently started a program to provide technical consulting and training assistance to customers so that they have an opportunity to utilize the new INTELSAT services and technologies more cost effectively. The program called, "The Advantage Program Mission," offers free consultation and training resources to present the latest developments and applications in satellite telecommunications technology, as well as training fellowships through the INTELSAT On-the-Job Training Program.<sup>86</sup>

29. In view of these changed circumstances since 1984, we conclude that permitting direct access will provide U.S. customers the opportunity to realize efficiencies in accessing INTELSAT satellites by obtaining administrative, market, and technical support directly through INTELSAT, from the initial planning stages for a service through service implementation, rather than having to use Comsat as an intermediary.

30. *Greater Flexibility and Control.* Direct access to INTELSAT from the United States today will permit greater flexibility and control for INTELSAT customers. INTELSAT states that direct access offers greater service flexibility than going through a Signatory because it is able to individually tailor services in terms of bandwidth, time duration, performance standards, redundancy and service applications.<sup>87</sup>

31. Commenters agree that direct access in the U.S. would generate such service flexibilities. C&W asserts that Comsat does not offer all of the services available from the INTELSAT Tariff Manual, thereby limiting the variety of services that carriers can then provide to their customers.<sup>88</sup> MCI WorldCom argues that Comsat has refused to resell services available from INTELSAT (noting a specific example in which Comsat has refused to offer preemptible leases on INTELSAT satellites).<sup>89</sup>

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<sup>84</sup> *Id.*

<sup>85</sup> See [www.INTELSAT.Int/csc/process.htm](http://www.INTELSAT.Int/csc/process.htm) (includes web site titled "Become a Customer").

<sup>86</sup> See <http://www.INTELSAT.com/products/iadp/advantage.htm>.

<sup>87</sup> See "Accessing INTELSAT...Directly", reprinted in Record of Hearing before the Subcommittee on Telecommunications, Trade, and Consumer Protection on H.R. 1872, at pp. 135-141.

<sup>88</sup> C&W comments at 2.

<sup>89</sup> MCI WorldCom comments at 14. In response, Comsat states that public service telephony network ("PSTN") service is not a preemptible service in nature. However, MCI WorldCom's trunking network includes more than the single satellite path and it can certainly reroute traffic to other paths in the event of an interruption on the satellite path. Thus, we believe that this kind of preemptible decision should be



32. In comparing INTELSAT's and Comsat's tariffs, we note that direct access customers have the flexibility to use leased transponders for any service application, i.e. voice. In contrast, Comsat leases capacity by individual service.<sup>90</sup> INTELSAT also offers customers greater flexibility with regard to the length of time a transponder can be leased. INTELSAT will lease a transponder for daily, monthly, and yearly time periods, or any pro-rated time period extending up to fifteen years.<sup>91</sup> In contrast, for long-term leases, Comsat offers only fixed terms of one, five, and ten year services for non-preemptible services and one, two, five, seven, and ten year terms for preemptible services.<sup>92</sup> With regard to bandwidth offerings, direct access customers may have greater flexibility in the amount of bandwidth they may purchase with direct access, as they may purchase bandwidth in units of 0.1 MHz to 150 MHz, and any proportion in between, regardless of its service type.<sup>93</sup> By contrast, Comsat provides a more limited offering of the various bandwidth configurations, except for internet service.<sup>94</sup> We particularly note that Comsat's video services are limited in terms of duration and bandwidth offerings, relative to INTELSAT.<sup>95</sup>

33. INTELSAT has also stated that direct access customers have the advantage of greater control over a number of elements that can affect their telecommunication services, such as service quality, performance costs, connectivity, redundancy, and earth station capabilities.<sup>96</sup> INTELSAT states that "depending on the level of direct access, coming to INTELSAT puts the customer in charge."<sup>97</sup> AT&T and C&W agree that direct access would offer it greater control over these service features and functions.<sup>98</sup> According to AT&T, by eliminating the Signatory as an intermediary, customers have greater control from the initial planning stages through the final end-to-end testing and start of

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made by carriers, the end-users themselves, rather than by Comsat for its customers.

<sup>90</sup> Comsat Corporation, Original Tariff FCC No. 3 Transmittal No. 125 (*effective* June 26, 1999) ("Comsat Tariff No. 3")

<sup>91</sup> INTELSAT Tariff Manual (July, 1998). Board of Governors 118-18 (May 8, 1997).

<sup>92</sup> Comsat Tariff No. 3 at 35-78.

<sup>93</sup> Comsat Tariff No. 3.

<sup>94</sup> In 1999, Comsat offered bandwidth units of .1, 1, 5, 9, 18, 24, 36, 72, 112, and 150 MHz, and does not allow its customers to purchase any other configurations. For example, a customer would not be able to purchase 12 MHz of capacity under Comsat's tariff plan. See Comsat Tariff No. 3 at 139-141.

<sup>95</sup> Comsat Tariff No. 3 at 35-78.

<sup>96</sup> See "Accessing INTELSAT...Directly", reprinted in Record of Hearing before the Subcommittee on Telecommunications, Trade, and Consumer Protection on H.R. 1872, at pp. 135-141.

<sup>97</sup> INTELSAT Direct Access Customer Brochure at 4.

<sup>98</sup> AT&T comments at 12; C&W comments at 2.

operation.<sup>99</sup> C&W asserts that direct access in the U.K. has meant that it has greater control over the quality and variety of satellite services it can then offer to its own customers -- an advantage especially important in the highly competitive U.K. telecommunications environment.<sup>100</sup>

34. The benefits of greater flexibility and control were unavailable when we considered direct access in 1984 because INTELSAT did not offer a direct access program.<sup>101</sup> INTELSAT did not then offer flexible tariffs. INTELSAT also did not offer no-limit transponder leases until the early 1990's and did not offer long term channel rates to its switched-voice customers before 1989. With the introduction of a formal direct access program in 1992, and the steps INTELSAT has taken to provide its customers with greater flexibility and control over the purchase of INTELSAT services, U.S. customers should benefit from direct access.

(b) Cost Savings

35. Another change since 1984 are the cost savings that now appear achievable from allowing direct access. The *Notice* stated that one of the main user benefits identified by INTELSAT for direct access is the avoidance of mark-up costs that a third party usually charges. We noted that AT&T and MCI WorldCom claim that Comsat's average margin over IUC rates is 68 percent, as well as an estimation that direct access would reduce this margin to 35 percent,<sup>102</sup> producing a cost savings of \$1 billion over a ten year period.<sup>103</sup> We also noted Comsat's contention that direct access would not generate any meaningful cost savings because a surcharge would be necessary to allow for (1) a proper return on its investment and (2) recovery of costs associated with its Signatory responsibilities and carrier functions.<sup>104</sup> The result of properly quantifying costs, asserted Comsat, would yield a savings of zero.<sup>105</sup>

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<sup>99</sup> AT&T comments at 12.

<sup>100</sup> C&W comments at 2.

<sup>101</sup> INTELSAT only offered monthly rates for voice circuit (\$390 per circuit per month) in the mid 1980's. Also around that time, it started offering long-term rates for voice circuits. For transponder leases it was restricted by certain service types. Today, INTELSAT offers a much more flexible tariff, as it indicates in its tariff manual under the footnote of its offerings "Leases are available for any intermediate period between 1 week and 15 years in allotment sizes from 0.1 MHz." Source: INTELSAT Tariff, July 1998.

<sup>102</sup> *Notice*, 13 FCC Rcd at 22036.

<sup>103</sup> *Id.* See also MCI WorldCom comments at 12 (The Satellite Users Coalition estimates a benefit to consumers of \$1,018.9 billion over a ten year period, or a present value is \$690.3 billion, on the assumption that Comsat reduces its margin over IUC rates to 33 percent from Comsat's average margin of 68 percent. This estimation also assumes that the FCC permits a fresh look policy which would allow customers to renegotiate their contracts.)

<sup>104</sup> *Notice*, 13 FCC Rcd at 22036.

<sup>105</sup> *Notice*, 13 FCC Rcd at 22036.

36. Most parties commenting on this issue maintain that allowing direct access will lead to substantial cost savings. They also contend that Comsat should be allowed no, or a limited, surcharge to IUC rates. C&W anticipates substantial savings in the first year of direct access in the United States, and that the savings will increase by 50 percent in each subsequent year.<sup>106</sup> GE Americom states it has experienced the cost savings of direct access in Germany, where prior to direct access, its Spacenet-Europe subsidiary paid approximately a 12 percent mark-up over INTELSAT rates.<sup>107</sup> Loral Orion states that direct access has reduced INTELSAT rates by 25 percent or more in Germany and the UK.<sup>108</sup> MCI WorldCom asserts that the excessive nature of Comsat's mark-ups is readily apparent from the fact that Comsat charges mark-ups for services for which it provides no facilities other than INTELSAT space segment.<sup>109</sup> BT North America states that the decline in Comsat's market share implies that its rates are too high and Comsat has not responded to competitive pressures.<sup>110</sup>

37. We conclude that allowing Level 3 direct access will lead to significant cost savings by INTELSAT users in the United States for the provision of international satellite services. We further conclude that users, in exchange for the option of direct access, must pay Comsat a surcharge to allow it to recoup certain costs associated with its unique Signatory functions. As discussed below, we find that a Comsat surcharge of 5.58 percent over IUC rates would allow Comsat to recover Signatory-related costs not otherwise recoverable through IUC rates. While the cost savings over IUC rates will vary among different users and services, we estimate that direct access users will be able to avoid most of the mark-up currently imposed by Comsat for most services.<sup>111</sup> The table in Appendix D demonstrates a range of cost savings from 16 percent to 71.4 percent for switched voice ("IDR") and private line ("IBS") leased service under a direct access regime, even after permitting Comsat to recoup a 5.58 percent surcharge.<sup>112</sup> Under the longer-term IDR leases (normally 10-15 years), cost savings will range from 23.2 percent to 52 percent.<sup>113</sup> Under the most often used shorter-term IBS leases (normally 1-3 years), cost savings will range from 16 percent to 42 percent. For video services, the range of cost savings under a direct access regime that includes a Signatory expense surcharge, will be from 10.7 percent to 35.2 percent.<sup>114</sup>

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<sup>106</sup> C&W comments at 3.

<sup>107</sup> GE Americom comments at 9.

<sup>108</sup> Loral comments at 7.

<sup>109</sup> MCI WorldCom comments at 13.

<sup>110</sup> BT North America reply at 26.

<sup>111</sup> See Appendix D.

<sup>112</sup> *Id.*

<sup>113</sup> *Id.*

<sup>114</sup> See Appendix E.

38. We anticipate that carriers and users will pass through any cost savings from direct access to consumers. For example, recent decreases in international settlement rates have led to significant price decreases of international telephone calls from 1997 to 1998.<sup>115</sup> Loral Orion states, that by avoiding Comsat's mark-ups of between 9 and 15 percent, it would be able to pass on such savings to its customers.<sup>116</sup> IT&E states that given the substantial competition it faces from other carriers, it would have every incentive to pass along the cost savings it would receive by the elimination of Comsat's mark-up to its consumers.<sup>117</sup> We also conclude that in a competitive telecommunications environment, U.S. carriers and service providers will have incentives to pass through cost savings to end-users.

39. In addition, direct access will potentially lead to lower costs for all users, including low volume users. We note that, based on current Comsat tariff filings, low volume users pay a much higher margin over INTELSAT IUC rates than high volume users. Direct access will likely offer low volume users a lower rate -- even with the surcharge discussed below -- for the following reasons. First, we agree with MCI WorldCom and GlobeCast that direct access will spawn numerous potential providers of INTELSAT space segment to low volume users, thus offering greater choice.<sup>118</sup> Second, like MCI WorldCom and GE Americom, we find no merit in Comsat's claim that direct access will reduce economies of scale, thus producing harm to low volume users who do not purchase directly from INTELSAT. The relevant economies of scale, we believe, are those experienced by INTELSAT, and not Comsat.<sup>119</sup>

40. In the prior *1984 Direct Access Order* proceeding the Commission concluded that adopting direct access would yield very little cost savings. The basis for this conclusion was that direct access, at best, would redistribute, rather than reduce the costs of providing INTELSAT satellite service. However, in view of the technical and operational services now available since 1984 from INTELSAT, as well as other customer support functions now available since 1984 as described above, we find that allowing direct access will promote cost savings rather than merely causing cost shifting.<sup>120</sup> We agree with the Networks and MCI WorldCom that the speculation that was required to analyze cost savings in 1984 is no longer necessary because INTELSAT has adopted formal

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<sup>115</sup> MCI WorldCom reply at 16-17. *See also* FCC International Bureau, Report on International Telecommunications Markets 1997-1998 (prepared for Senator Ernest F. Hollings) (Dec. 7, 1998).

<sup>116</sup> IT&E comments at 2. Loral comments at 6.

<sup>117</sup> IT&E comments at 2.

<sup>118</sup> MCI WorldCom comments at 15-16. GlobeCast comments at 3.

<sup>119</sup> MCI WorldCom comments at 15-16. GE Americom comments at 9.

<sup>120</sup> GE American concurred. Based on its subsidiary Spacenet -Europe, it "has found that INTELSAT's sales force is very responsive and keeps direct access customers well-informed regarding the availability of INTELSAT space segment." GE Americom comments at 9. *See also* C&W comments at 2.

procedures for direct access.<sup>121</sup> We further agree with the Networks that "[it is not] possible to know precisely -- nor should it be -- the extent of the 'cost savings' that may be realized by customers until further competition engendered by direct access develops, [and that] the point is to allow the additional competition which does develop to wring out whatever cost saving may be achieved . . . ." <sup>122</sup>

(c) Increased Competition

41. There have been significant positive changes in the international telecommunications market since 1984. Notably, the market is now largely competitive in terms of availability of alternative suppliers of international transmission capacity.<sup>123</sup> The existence of competitive alternatives of transmission capacity, however, is not, as Comsat suggests, a basis for precluding additional customer choice available through direct access. United States policy, both as reflected in Commission decisions and by Congress in the Telecommunications Act of 1996, is to promote competition in the provision of communications services.<sup>124</sup> Competition is the underlying goal of the 1997 WTO Agreement, which resulted in market opening commitments for basic telecommunications services by many countries. Of the 72 such Signatories, the United States is one of only three WTO members that signed the WTO Agreement that took a market access limitation for direct access to INTELSAT.<sup>125</sup>

42. While making Level 3 direct access available does not add another facilities-based competitor, the additional choice, flexibility, and cost savings made available by direct access to U.S. customers in use of an existing facilities-based provider -- INTELSAT -- would result in increased competition. Level 3 direct access would place competitive pressures on other satellite operators in terms of service, price, and quality. In addition, it would place competitive pressures on Comsat, particularly with respect to services for which Comsat has a markup substantially higher than INTELSAT IUC rates.

43. The benefit of direct access is especially relevant in the non-competitive switched voice, private line, and occasional use video markets, where Comsat is still dominant. In the *Comsat Non-Dominant Order* we determined, with respect to thin route markets, that U.S. customers must, by default, choose Comsat for services in these markets; that Comsat retains a significant cost advantage over other authorized U.S. carriers in these markets; and that it exercises market power and is

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<sup>121</sup> Network comments at 12; MCI WorldCom comments at 10.

<sup>122</sup> Network comments at 12. Although we estimate percentages of cost saving in appendix D & E to this document based on the data we now have available to us, we note that it is impossible to know the exact percentage of cost savings in the future as many variables could cause the predicted cost savings to change.

<sup>123</sup> See *Comsat Non-Dominant Order*, 13 FCC Rcd at 14147-14149.

<sup>124</sup> *Telecommunications Act of 1996*, 47 U.S.C. § 153 *et seq.*

<sup>125</sup> See MCI WorldCom comments at 11.

dominant in the provision of services to these markets.<sup>126</sup> Direct access offers an opportunity to introduce competition in these markets where it clearly does not now exist. This is especially significant given that thin route countries potentially represent some of the growth markets for telecommunication services.<sup>127</sup> Imposing Level 3 direct access would serve the Satellite Act's purpose of promoting growth in communications between the U.S. and economically less developed countries by promoting competition and expanding user choice for U.S. services to these markets. We conclude that permitting Level 3 direct access to thin route markets would: (1) reduce Comsat's bottleneck over access to U.S. INTELSAT capacity that is the only service of international transmission capacity serving these markets; (2) give U.S. carriers the option of using another supplier; and (3) reduce Comsat's market power in these markets.

44. We also conclude that direct access should be made available for services to competitive markets as well as to non-competitive markets. Every party commenting on this issue, other than Comsat and Lockheed Martin, argue that direct access should be permitted in all markets.<sup>128</sup> We recognize, as MCI WorldCom asserts, that direct access to competitive or thick route markets is especially significant where fiber optic cable: (1) does not provide a viable alternative to INTELSAT; (2) transmission involves complex or inefficient routing; (3) it does not reach the entire country; and (4) there is insufficient cable capacity to meet demand, or only one cable is available and satellite capacity is required to minimize the effects of network outages. In addition, permitting Level 3 direct access to all markets will give U.S. carriers more flexibility in assuring efficient utilization of satellite and cable facilities.<sup>129</sup> For example, if direct access is only allowed on thin routes, then carriers would likely purchase thin route capacity from INTELSAT and be forced to purchase thick route capacity from Comsat. This approach may undermine carriers' flexibility in shifting capacity among routes and in buying transponder leases under Level 3 direct access that permit service to both "thin route" and "thick route" countries.

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<sup>126</sup> *Comsat Non-Dominant Order*, 13 FCC Rcd at 14141-14146.

<sup>127</sup> In particular, we note that the Satellite Act's stated purpose includes: (a) "[M]aintain[ing] and strengthen[ing] competition in the provision of communications services to the public," 47 U.S.C. § 701(c); and (b) direct[ing] "care and attention . . . toward providing such services to economically less developed countries." 47 U.S.C. § 701(b). See also *Notice* at 22028-22029. Many of the countries deemed to be in non-competitive markets for switched voice and private line services and for occasional use video services are designated by the International Telecommunication Union ("ITU") as "least developed countries" ("LDCs"). Telecommunications Indicators for the Least Developed Countries, First Edition, 1995, at 1-3. Of the 48 listed LDCs, 38 are included on our list of thin route countries for switched voice and private line service. *Comsat Non-Dominant Order*, at paras. 41-42 and Appendix A. We found in our *Comsat Non-Dominant Order* that the thin route market accounts for approximately ten percent of international traffic and concluded that it was not *de minimis* for purposes of deciding whether to forebear from dominant carrier regulation of Comsat. *Comsat Non-Dominant Order*, 13 FCC Rcd at 14158-14159.

<sup>128</sup> Loral Orion comments at 4; MCI WorldCom comments at 17-21; Network comments at 13-14; PanAmSat comments at 5 and 10; and Sprint comments at 7-9.

<sup>129</sup> *Id.* at 20.

45. We agree with the Networks that the fact that we deemed markets competitive in reclassifying Comsat non-dominant for purposes of tariff regulation does not preclude us from permitting direct access in all markets where there are public interest benefits in doing so.<sup>130</sup> Certainly, we have no policy precluding new entrants from markets that are already competitive. We find, based on the record before us, that there will be significant benefits to Level 3 direct access, as pointed out by the major commercial users of INTELSAT capacity in the United States. Choice by U.S. carriers and users as to how they access the INTELSAT system will result in competition in currently non-competitive markets and enhance competition in competitive markets. We find that the public interest is served by the competition in all markets that will result from additional choice.

46. *Promoting Competition.* We further find that the customer benefits and added competition that will result from introducing Level 3 direct access in the United States will promote U.S. competitiveness in the global telecommunications market. In 1962, when the Satellite Act was enacted, there existed only eight U.S. international carriers providing international voice and record communications using undersea cable of limited capacity (non-fiber) and radio facilities.<sup>131</sup> AT&T was the dominant U.S. international provider. By 1984, voice and record services were provided over both higher capacity undersea cables and satellites provided by INTELSAT through Comsat in the United States. AT&T continued to be the dominant provider of international voice services with MCI, Sprint, and other carriers beginning to make progress in entering international markets.<sup>132</sup> There are now over 77 U.S. facilities-based carriers operating in the United States, providing a wide array of voice, data and video services over fiber optic cable and satellite.<sup>133</sup> These carriers compete on a global basis against the emerging multinational carriers, as well as traditional national telecommunications providers.<sup>134</sup> They are competing to capture public, multinational business and government customers in national telecommunications markets opening around the world as a result of the WTO Agreement.<sup>135</sup> In some cases, their competitors are still dominant service providers in their

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<sup>130</sup> Network comments at 13-14 and reply at 14. *See also* Sprint comments at 7.

<sup>131</sup> *See* Testimony of Newton Minow, Chairman, Federal Communications Commission, before the House Committee on the Judiciary, Anti-trust Subcommittee, June 18, 1961.

<sup>132</sup> *See Earth Station Ownership* at 267 (noting introduction of new entrants for the provision of international voice and record services).

<sup>133</sup> Compiled from Circuit Status Reports filed by U.S. carriers covering 1998.

<sup>134</sup> *See* FCC International Bureau, *Report on International Telecommunications Markets 1997-1998*, Attachments 1 and 2; (Dec. 7, 1998) (available at <http://www.fcc.gov/Bureaus/International/Reports/ritm9798.pdf>).

<sup>135</sup> *See Foreign Participation Order*, 12 FCC Rcd 23,891 (1997), *recon. pending*; 1998 Biennial Regulatory Recon; *Reform of the International Settlements Policy and Associated Filing Requirements*, Docket No. 98-148, FCC 99-73 at 5.

national markets.<sup>136</sup> Many of the foreign competitors of U.S. carriers either are Signatories to INTELSAT or have direct access to INTELSAT available in the national markets in which they operate. The public interest is served by bringing the advantages of increased competition to U.S. consumers in terms of lower prices and better service.

47. U.S. telecommunication service providers face a competitive disadvantage compared to foreign carriers that can obtain INTELSAT capacity at IUC rates, either because they are INTELSAT Signatories or are operators from countries that permit direct access. The comments we have received to our *Notice* demonstrate that the anticipated benefits of direct access – lower costs, greater efficiency, flexibility, and control over facility use, as well as competitive pressures on the rates of Comsat and competing satellite operators – should enable U.S. industry to better compete with foreign competitors.<sup>137</sup> And, in view of the potential for direct access to enhance U.S. competitiveness, we do not believe that any special regulatory measures are necessary to assume that cost savings resulting from direct access are passed on to customers. The increased competition resulting from direct access is more likely to result in savings to consumers than what may be realized in the absence of direct access.

48. Two examples provided by commenters that show U.S. competitiveness will be enhanced are particularly illuminating. MCI WorldCom states that the competitive advantage enjoyed by foreign carriers in being able to acquire INTELSAT capacity at IUC rates resulted in its loss of a contract for international Internet services to a foreign carrier because of an inability to match the foreign carriers pricing of INTELSAT satellite links.<sup>138</sup> Similarly, Loral Orion and C&W point out that the Canadian Signatory, Teleglobe, has a competitive advantage because it can purchase INTELSAT capacity in Canada at IUC rates and deliver traffic to the United States via Teleglobe fiber links.<sup>139</sup> Loral Orion and C&W state that this competitive advantage would be negated if direct access were to become available in the United States.

49. Additionally, Loral Orion and other commenters point to their experience in operating in foreign markets where direct access is available, as demonstrating its competitive benefits. Loral Orion states that it has been able to expand into markets because direct access made it economical to

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<sup>136</sup> See International Bureau Report on International Telecommunications Markets 1997-1998 at 5.

<sup>137</sup> See Americatel comments at 1; AT&T comments at 12-13; BT North America reply at 25-26; C&W comments at 3 and reply at 4-5; Ellipso comments at 2, 6, and 15-19; GE Americom comments at 8 and reply at 11; GlobeCast comments at 3-4 and reply at 4; ICG comments at 3 and reply 6-7; IT&E comments at 2-3; Loral Orion comments at 6-7; MCI comments at 16-18 and reply at 17; and PanAmSat comments at 5.

<sup>138</sup> MCI WorldCom comments at 16.

<sup>139</sup> Loral Orion comments at 6-7.; C&W comments at 3.



initiate service in these countries.<sup>140</sup> BT North America states that direct access has reduced costs of INTELSAT access in the United Kingdom far below the equivalent charges in the United States, while at the same time increasing competition in the United Kingdom satellite services market.<sup>141</sup> We noted above the cost savings of the GE Americom affiliate in Germany.<sup>142</sup> C&W echoes other comments regarding cost savings realized from direct access in the United Kingdom, but also points out that direct access has enabled it to respond to customer needs and add flexibility to its operations to the benefit of U.K. telecommunications users.<sup>143</sup> C&W, as well as other commenters, point out that a beneficiary of direct access in the U.K. is a Comsat affiliate, Comsat General (U.K.).<sup>144</sup> The Networks state that the availability of direct access in other countries has provided benefits such as avoiding substantial "add-on fees" and facilitating "operational arrangements for through circuits."<sup>145</sup>

50. Comsat argues that U.S. companies are already obtaining INTELSAT capacity through the Canadian company Teleglobe as an alternative to Comsat.<sup>146</sup> Teleglobe offers lower rates and service alternatives for U.S. firms wishing to use INTELSAT facilities, despite having to go through land line facilities and Canadian earth stations in order to use Teleglobe.<sup>147</sup> Comsat asserts that the availability of Teleglobe to U.S. carriers and users provides U.S. customers with a competitive alternative to use of INTELSAT for both competitive and non-competitive markets and demonstrates that there are "no market place facts" that justify Level 3 direct access in the United States.<sup>148</sup> We disagree. U.S. customer use of Teleglobe demonstrates a clear market demand for lower rates for the use of INTELSAT facilities. Current U.S. policy that causes U.S. customers to satisfy commercial needs by routing traffic through another country is not in the public interest. Introduction of Level 3 direct access in the United States will provide an alternative for U.S. customers to satisfy their need superior to routing traffic through Canada.

## (2) Cost Recovery

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<sup>140</sup> See Loral comments at 7 noting, for example, that direct access in Germany and United Kingdom has reduced rates for INTELSAT space segment capacity by 25 percent.

<sup>141</sup> BT North America reply at 23.

<sup>142</sup> See GE Americom comments at 9.

<sup>143</sup> C&W comments at 5.

<sup>144</sup> *Id.*

<sup>145</sup> Network comments at 14-19.

<sup>146</sup> Comsat comments at 59-60 and reply at 38.

<sup>147</sup> See Loral Orion comments at 6; C&W comments at 3; and GlobeCast comments at 4.

<sup>148</sup> Comsat comments at 60.

51. The *Notice* noted Comsat's contention that INTELSAT IUC rates do not reflect many costs that it would continue to incur on behalf of direct access customers.<sup>149</sup> We asked Comsat to specify which of these costs it believes should be added to IUC rates to allow for fair recovery, and to specify the activities or transactions that give rise to these costs and the magnitude of these costs. We also asked parties to respond to Comsat's argument that if the Commission allows direct access we should provide for a "surcharge" to allow Comsat to recover expenses that it alleges are not recoverable through IUC rates, and to comment on the cost information that Comsat provides. We sought comment from all parties on which costs, if any, should be recovered by Comsat by means of a surcharge imposed on U.S. direct access users.<sup>150</sup>

52. Comsat maintains that IUC rates do not represent the true "cost" or "price" of providing INTELSAT space segment service. Comsat asserts that IUC rates do not reflect the following expenses that it will continue to incur on behalf of direct access customers: (1) direct costs undertaken in performing its Signatory functions on behalf of the U.S. government and all users of INTELSAT service; (2) corporate tax liabilities; and (3) indirect costs associated with Comsat's investment and operating liabilities.<sup>151</sup> Comsat also argues that IUC rates do not provide Comsat a fair after-tax return on its statutorily-mandated investment.<sup>152</sup>

53. Comsat states that the appropriate surcharge should range, on average, from 28.67 percent to as much as 45.55 percent of the applicable IUC, depending upon whether the Commission allows Comsat to earn a rate-of-return of 12.48 percent, which represents the after-tax level of return allowed by the Commission under rate-base rate of return regulation, or 15.64 percent of the weighted average rate of return earned by price cap companies.<sup>153</sup> These numbers are based on 1997 data and Comsat notes that these numbers serve as proxies, and should not be substituted for a full-blown analysis.<sup>154</sup>

54. Most proponents of direct access oppose imposition of any surcharge. A few parties state they would support a very limited surcharge for direct Signatory-related expenses only.<sup>155</sup>

(a) Signatory-Related Expenses

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<sup>149</sup> Comsat "Joint Response to Satellite Coalition Analysis" at 13.

<sup>150</sup> *Notice*, 13 FCC Rcd at 25.

<sup>151</sup> Comsat comments at 65-66.

<sup>152</sup> Comsat comments at 68-69.

<sup>153</sup> Comsat comments at 83-84.

<sup>154</sup> Comsat comments at 84.

<sup>155</sup> See Network comments at 7-8; AT&T comments at 15.

55. Comsat asks that the Commission permit a surcharge for expenses Comsat believes are incurred in performing its role as U.S. Signatory to INTELSAT. These expenses, asserts Comsat, include both Signatory function expenses and insurance expenses.<sup>156</sup>

(i) Signatory Function Expenses

56. Comsat identifies the following activities and functions as Signatory function expenses: (1) attending and preparing for INTELSAT meetings; (2) participating in the U.S. Government instructional process; (3) protecting its investment in INTELSAT; (4) representing the interests of U.S. carriers and users within INTELSAT; and (5) observing the implementation of procedures for assigning space segment capacity to users.<sup>157</sup> Comsat asserts that IUC rates do not cover these expenses, which amounted to \$3.005 million in 1998.<sup>158</sup>

57. Comsat also identifies certain capitalized headquarter expenses attributable to carrying out the Signatory function. These include expenses for computer equipment, software, and communications equipment.<sup>159</sup> Since some costs which Comsat believes should be recoverable may be incurred by functions which also generate non-recoverable costs, we asked in our *Notice* that Comsat discuss how it would assign its costs. In its response, Comsat stated that it had allocated 25 percent of these capitalized headquarter expenses to the Signatory function, based on the expectation that significant staffing would still be required to carry out statutorily-mandated Signatory activities under a Level 3 direct access regime.<sup>160</sup> These total capitalized expenses amount to \$330,000, and are in addition to the \$3.005 million figure listed above.<sup>161</sup>

58. Proponents of direct access have mixed views about whether the Commission should permit a surcharge for expenses identified by Comsat as Signatory function expenses. The Networks, AT&T, and MCI WorldCom state that the Commission should, at most, allow Comsat to recover costs directly attributable to its official role as the U.S. Signatory to INTELSAT.<sup>162</sup> MCI WorldCom argues that a Signatory surcharge should be limited to U.S. government instructional process expenses, and should

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<sup>156</sup> Comsat comments at 65-66.

<sup>157</sup> See *Ex Parte* letter from Comsat, Keith Fagan, to the Federal Communications Commission Secretary, Magalie Roman Salas, June 11, 1999 ("*Comsat June 11 Ex Parte*") at 13-14.

<sup>158</sup> See Comsat comments, Attachment 1 at Exhibit 4 (Theodore Boll).

<sup>159</sup> Comsat June 11 *Ex Parte* at 13-14.

<sup>160</sup> Comsat June 11 *Ex Parte* at 11.

<sup>161</sup> *Id.*

<sup>162</sup> See AT&T reply at 15; MCI WorldCom reply at 24; and Network reply at 17.

not include expenses for Comsat participation in INTELSAT governance in order to protect its commercial interest in INTELSAT.<sup>163</sup>

59. In contrast, PanAmSat argues that INTELSAT's investment return to Comsat is more than adequate to compensate Comsat for its Signatory-based costs.<sup>164</sup> BT North America states that British Telecom ("BT") does not impose a surcharge for costs associated with its Signatory and carrier functions because the costs associated with the administrative burden in separating Signatory costs from purely commercial costs would outweigh the benefits.<sup>165</sup> BT North America states that it finds astounding that Comsat records as a direct Signatory cost 25 percent of the total costs of its headquarters facilities. Before implementing direct access in the United Kingdom, BT only added a seven percent surcharge to IUC rates to recover costs it incurred in placing orders.<sup>166</sup>

60. In determining whether Comsat should be allowed to recover a particular operating expense, our functioning principle is that Comsat should not be allowed to recover any discretionary expenses unrelated to its unique Signatory functions. However, Comsat should recover costs that are unavoidable, non-discretionary Signatory-related functions and expenses that Comsat will continue to incur even after the implementation of direct access. We believe such expenses should be included in a surcharge because they are incurred as a result of the role Congress gave Comsat and mandated by the Satellite Act, and because they are likely to produce value for those customers who take advantage of direct access.

61. Based on the record before us, we find that the activities identified by Comsat constitute unavoidable, non-discretionary Signatory-related functions that Comsat cannot proportionally reduce after the implementation of direct access. We agree with the Networks' assessment that such Signatory costs are unique to Comsat. In addition, these Signatory activities directly benefit potential users of direct access because Comsat must represent all U.S. interests in connection with INTELSAT decision-making.

62. We disagree with PanAmSat that the INTELSAT return before tax is more than adequate to compensate Comsat for Signatory-related costs. Despite PanAmSat's assertion, we find that it is appropriate that Comsat be compensated for direct Signatory-related expenses in addition to IUC payments. It would be unfair to Comsat to allow an unavoidable, non-discretionary expense, such as those incurred by the Signatory function, to reduce that return. While we recognize that British Telecom does not impose a surcharge for Signatory expense to direct access users in the United Kingdom, this factor alone does not justify requiring Comsat to act as the U.S. Signatory without compensation for its unavoidable costs.

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<sup>163</sup> MCI WorldCom reply at 24.

<sup>164</sup> PanAmSat reply at 7.

<sup>165</sup> BT North America comments at 5-7.

<sup>166</sup> C&W comments at 5-6; BT North America comments at 3-4.